STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2007
v	No. 263802 Ingham Circuit Court
JACKIE TALMADGE JIMMERSON, Defendant-Appellant.	LC No. 04-000386-FH

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age), and two counts of accosting a child for an immoral purpose, MCL 750.145a. Defendant was acquitted of two additional counts of CSC II and of one additional count of accosting. Defendant was sentenced to concurrent prison terms of 30 to 180 months for the CSC II conviction and 14 to 48 months for the accosting convictions. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of defendant's presentence investigation report (PSIR).

I.

Defendant first argues that his counsel was ineffective for failing to move to sever the charges that he accosted two minor females in 2003 from the charge that he sexually assaulted another minor female in 1997. We disagree. The question whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error and questions of law are reviewed de novo. *Id.*

Defendant must overcome the presumption that his counsel was effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). In particular, defendant must overcome the presumption that his counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691. Decisions concerning which motions to file are matters of trial strategy, within the sound professional judgment of the trial counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's

competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Second, defendant must show that his counsel's representation was so prejudicial that it deprived him of a fair trial. *Strickland*, *supra* at 691-692; *Pickens*, *supra* at 303. To establish prejudice, defendant must show a reasonable probability that the outcome would have been different but for his counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant fails to overcome the presumption that his counsel's decision not to move to sever the 1997 and 2003 charges was a matter of trial strategy and, hence, objectively reasonable. By not challenging the joinder of these charges, defense counsel could more effectively argue that all charges against him were false accusations made out of revenge or to ensure that his wife would receive all the marital assets in their pending divorce action. Further, the charges for which defendant was convicted were combined with charges for which he was acquitted, namely, that he accosted his adopted daughter in 2003 and engaged in sexual conduct with her in 1995 and 1997. Trying all charges together permitted defense counsel to attempt to tarnish the assertions of the complaining witnesses with attacks on the credibility of other witnesses, particularly defendant's adopted daughter. Also, defendant's counsel could juxtapose the testimony of the two complaining witnesses in the CSC II charges and highlight inconsistencies. This permitted counsel to then argue that both stories were inherently unreliable. Accordingly, defendant fails to establish that his counsel's performance was objectively unreasonable.

Moreover, defendant fails to establish the requisite prejudice. Defendant argues that he was prejudiced because the CSC II charges cited would have made the jury more likely to credit the testimony of the complaining witnesses with respect to the cited accosting charges. The underlying assumption is that the number of charges alleged has the effect of implying that defendant is a bad person, which could arguably lead to a forbidden character inference. See *People v Daughenbaugh*, 193 Mich App 506, 511; 484 NW2d 690 (1992), mod in part on other grounds 441 Mich 867 (1992). However, we will not assume that defendant's convictions on the accosting charges stems from an improper character reference and not from the evidence presented. Moreover, this supposition is undermined by the jury's rejection of the three charges regarding improprieties against defendant's adopted daughter. If the number of charges would incline the jury to credit complaining witnesses, then the jury would have been inclined to believe that defendant committed the charged offenses against his adopted daughter. However, the jury seems to have discredited her accounts. Further, the trial court instructed the jury that "the fact that [defendant] is charged with more than one crime is not evidence." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, defendant cannot demonstrate a reasonable probability that, but for his counsel's failure to move to sever, the outcome of the trial would have been different. He is not entitled to relief on this issue.

II.

Defendant argues that he was denied his constitutional right to a unanimous verdict because the jury was given insufficient instructions to permit it to engage in proper deliberations. We disagree. Because defendant did not preserve this issue for appeal, we review it for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Defendant claims that, because the trial court did not instruct the jury concerning the elements of the offense of accosting a child for an immoral purpose beyond reading the text of the statute, it is possible that the jury's verdict was not unanimous. Specifically, defendant argues that the jury should have received an instruction explaining that it must unanimously agree that a particular act by defendant was sufficient to establish each accosting conviction. In *People v Cooks*, 446 Mich 503, 506; 521 NW2d 275 (1994), our Supreme Court concluded that a general unanimity instruction is sufficient when materially identical evidence is presented with respect to each act and there is no jury confusion. The focus throughout the trial was on defendant's attempted solicitation of sexual contact with the complaining witnesses. The trial court record does not show that the jury was confused by the statute or did not agree regarding which prohibited conduct formed the basis for each verdict. In light of this emphasis on defendant's attempted solicitation of the victims, we do not believe that defendant's rights were violated when the trial court failed to give a special unanimity instruction.

Defendant also argues that his trial counsel was ineffective for failing to request a unanimity instruction. However, defendant's trial counsel is not ineffective for failing to request a jury instruction that was not required. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

III.

Next, defendant argues that MCL 750.145a is unconstitutionally vague and overbroad, both facially and as applied to the circumstances of his case. Again, we disagree. MCL 750.145a states:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age . . . to engage in any of those acts is guilty of a felony . . . .

"A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms." *People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004) (citations omitted). "Statutes are presumed constitutional." *Phillips v Mirac, Inc*, 470 Mich 415, 442; 685 NW2d 174 (2004). "Whenever possible, courts should construe statutes in such a manner as to render them constitutional." *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984).

> No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a State legislature are to be presumed constitutional unless the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that

> reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act. [*Thayer v Dep't of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949), quoting *Sears v Cottrell*, 5 Mich 251, 259-260 (1858) (emphasis in original).]

"To determine whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings." *Dep't of State v Michigan Ed Ass'n—NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002). Substantive due process requires standards in a statute to be "reasonably precise." *Id.* A statute is reasonably precise if its terms give a person of ordinary intelligence a reasonable opportunity to know what the statute prohibits or requires. *Id.* at 116-117.

Defendant argues that MCL 750.145a is facially unconstitutional because the term "immoral act" does not provide fair notice of the conduct proscribed, gives unlimited discretion to jurors when deciding what constitutes a violation of this provision of the act, and is overbroad, impinging on First Amendment freedoms.[1] Accordingly, defendant argues, the question of what constitutes an "immoral act" depends on the values of the individual interpreting the provision.

The standard under which defendant may challenge the constitutionality of MCL 750.145a as overbroad and impinging First Amendment freedoms is different from the standard under which defendant must establish his other vagueness challenges. A defendant may facially challenge the constitutionality of a statute on overbreadth grounds "on the basis of the hypothetical application of the statute to third parties not before the court" if the statute impinges First Amendment rights. *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001). Further, when a defendant argues that a statute purports to regulate both speech and conduct, he must establish that the overbreadth of the statute is not only real, but is substantial, "'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 96, quoting *Broaderick v Oklahoma*, 413 US 601, 615; 93 S Ct 2908; 37 L Ed 2d 830 (1973). This Court noted:

> In *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 800; 104 S Ct 2118; 80 L Ed 2d 772 (1984), the United States Supreme Court explained that the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801. [*Id.*]

[1] Defendant also mentions that the term "depraved," as used in MCL 750.145a, is unconstitutionally vague. Because he does not develop this argument, he has abandoned it on appeal. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Further, "[a] statute may be saved from being found to be facially invalid on overbreadth grounds where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed." *Id.* We again note that words and phrases in a statute should be read in the context of the statute as a whole. See *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

Recognizing that we should construe statutes in a manner that renders them constitutional, we reject defendant's interpretation of MCL 750.145a as prohibiting someone from encouraging or enticing a child to engage in activity that is legal, yet disfavored by a particular religious sect.[2] Instead, the intent of the statute is to criminalize the act of accosting, enticing, soliciting, or encouraging a child under 16 from engaging in and being victimized by certain types of criminal activity. Specifically, we note that the list of prohibited conduct in MCL 750.145a includes prohibitions against inducing or forcing a child to engage in acts of sexual intercourse or gross indecency, in which the child would become the victim of a criminal act. By including the term "immoral acts" in its list of prohibited conduct, the Legislature indicated that it intended for the statute to prohibit encouraging or soliciting children from participating in or being victimized by certain criminal acts, especially those of a sexual nature. Accordingly, this statute is not unconstitutionally overbroad.

Except when a defendant alleges that a statute is overbroad and impinges First Amendment freedoms, "a criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad where the defendant's conduct is fairly within the constitutional scope of the statute." *Rogers*, *supra* at 95. The prosecution presented evidence that when defendant was alone with the 14-year-old victims, he commented that their genitalia were probably "nice" and recommended that they "should let an older man eat [them] out and do things with older men." The victims testified that they understood the term "eating out" to refer to oral sex. From this evidence, the jury could conclude that defendant suggested to and encouraged the victims to submit to oral sex, which is an act of sexual intercourse, with an adult. This is clearly prohibited by the terms of MCL 750.145a. Accordingly, defendant's constitutional challenge fails, both on its face and as applied to the facts of this case.

IV.

Defendant argues that the trial court erred when it instructed the jury on the elements of the accosting charges merely by reading the provisions of MCL 750.145a. He bases this argument on his contention that MCL 750.145a is unconstitutionally vague and that the meaning of the term "gross indecency" is unclear. Because defendant did not preserve this issue for appeal, we review it for plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003); *Carines*, *supra* at 764-765.

[2] Defendant cites examples of legal acts that are discouraged by various religious groups, including Mormon prohibitions against consuming caffeinated beverages, Southern Baptist prohibitions against dancing, and Jewish and Muslim prohibitions against eating pork.

"Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). As discussed *supra*, MCL 750.145a is not unconstitutionally vague. Further, as discussed *supra*, the prosecution presented sufficient evidence to permit the jury to conclude that defendant violated the provisions of MCL 750.145a by encouraging the 14-year-old victims to engage in sexual intercourse. Accordingly, the trial court did not violate defendant's substantial rights when it instructed the jury regarding the accosting charges by reading the statutory provisions of MCL 750.145a.

V.

We also reject defendant's claim that his accosting prosecutions violated the double jeopardy clause of the federal and state constitutions because his previous prosecution under MCL 750.145 (contributing to the delinquency of a minor) arose from conduct occurring during the same incident. Because defendant did not raise this question at trial, we review it for plain error affecting his substantial rights. *Carines*, *supra* at 764-765. The double jeopardy bar prohibits the following: "(1) . . . a second prosecution for the same offense after acquittal; (2) . . . a second prosecution for the same offense after conviction; and (3) . . . multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). In particular, the *Nutt* Court considered what constitutes a "second offense" within the meaning of the constitutional prohibition. *Id.* at 575. *Nutt* concluded that the *Blockburger*[3] test, i.e., the "same elements" test, "is the well-established method of defining the Fifth Amendment term 'same offence.'" *Id.* at 576.

The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. *Id.* If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied. *Id.* at 593. In this case, defendant argues that the elements that must be proven under MCL 750.145 are identical to those that must be proven under MCL 750.145a.

MCL 750.145 provides:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, . . . whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

Conversely, MCL 750.145a prohibits behavior intended "to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency." MCL 750.145 has no similar element, but instead states that a defendant is guilty of contributing to the delinquency of a minor if his words or actions cause the child "to become neglected or

[3] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

delinquent." Thus, even if defendant were prosecuted for the same acts under both statutes, it would not violate the double jeopardy provision of the state and federal constitutions.

Regardless, defendant was not prosecuted for the same acts under both statutes. Defendant's prosecution under MCL 750.145 was for providing alcohol to minors. The accosting charges in issue stemmed from defendant's sexual comments to the complaining witnesses. The plain language of the double jeopardy clause "'protects individuals from being twice put in jeopardy "for the same *offense*," not for the same *conduct* or *actions*.'" *Nutt, supra* at 580, quoting *Grady v Corbin*, 495 US 508, 529; 110 S Ct 2084; 109 L Ed 2d 548 (1990) (Scalia, J., dissenting). In this case, defendant was not subjected to successive prosecutions for either the same offense or the same conduct. The two prosecutions punished different conduct and different offenses arising from that conduct.

VI.

Finally, defendant notes that during the sentencing hearing he requested that the court remove his adopted daughter's victim impact statement from his PSIR because he was acquitted of all charges concerning her. The prosecutor stipulated to the request and the court granted it. However, the statement was not removed from the PSIR. Defendant is entitled to the removal of the statement. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). Because we affirm defendant's convictions, resentencing is unnecessary.

Defendant's convictions and sentences are affirmed. We remand for the limited purpose of modifying defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens